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IN THE

Supreme Court of the United States

October Term, 1958.

No. [redacted] 35

NICHOLAS A. STIRONE,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR PETITIONER.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1958.

No. 722.

NICHOLAS A. STIRONE,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Third Circuit is reported at 262 F. 2d 571 and is printed at R. 527 et seq. The dissenting opinion of Hastie, J. is reported at 262 F. 2d 578 and is printed at R. 535. The per curiam opinion denying rehearing appears at 262 F. 2d 580 and is printed at R. 553. The dissenting opinion of Chief Judge Biggs (in which Judge Hastie joined) on rehearing is reported at 262 F. 2d 580 and is printed at R. 554. The opinion of the District Court is reported at 168 F. Supp. 490 and is printed at R. 304a.

JURISDICTION.

The judgment of the Court of Appeals was entered on December 9, 1958. A petition for rehearing was denied on January 27, 1959. The petition for a writ of certiorari was filed on February 24, 1959 and was allowed on April 27, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

CONSTITUTIONAL, STATUTORY AND PROCEDURAL RULES PROVISIONS INVOLVED.

1. United States Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. United States Constitution, Article I, Section 8, Clause 3:

> "The Congress shall have power * * * To regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes."

3. Hobbs Act, 18 U. S. C. § 1951(a)

> "Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article

or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both."

QUESTIONS PRESENTED.

1. Can a conviction stand where the court below applied the Hobbs Act [1] as though the Federal courts have jurisdiction over every extortion or robbery from any victim whose local business uses or has used the channels of interstate commerce?

2. Can a conviction under the Hobbs Act stand when the extortion victim was a local manufacturer of concrete whose only connection with interstate commerce was that he bought sand from a local vendor who obtained the sand from another state and delivered it to victim?

3. Was due process violated because petitioner was indicted on a charge of obstructing the receipt from another state of sand for use in making concrete at a concrete manufacturing plant, but the trial judge permitted the jury to convict him of a different charge for which he was never indicted, namely obstructing the shipment of steel to other states from a steel mill to be constructed partly out of such concrete?

4. Was petitioner's conviction under the Hobbs Act sufficiently supported by evidence that the extortion victim, a local concrete manufacturer, delivered concrete to a local contractor for use in erecting a steel plant which when built would ship steel in interstate commerce?

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1. 18 U. S. C. § 1951.

STATEMENT OF THE CASE.

The jurisdiction of the District Court was invoked because petitioner was charged under a law relating to commerce, the Hobbs Act.

Petitioner was found guilty by a jury in the District Court for the Western District of Pennsylvania on the only count of an indictment charging him with having obstructed, delayed and affected interstate commerce[2] by extortion (R. 7a). He was sentenced to imprisonment for three years and was directed to pay a fine of $5,000.

We draw our recital of the facts partly from certain paragraphs of the Opinion of the Court of Appeals affirming the judgment of the District Court, as follows:

"Defendant, a labor union official, was alleged to have extorted money from a man named William G. Rider, who was in the business of supplying ready-mixed concrete. The Government's version of the facts, accepted by the jury, was that the defendant had come to Rider, following Rider's entering into a profitable contract to supply mixed concrete for the construction of a steel mill in Allenport, Pennsylvania, and that he had threatened Rider with the loss of that conctract if he did not give the defendant fifty cents a cubic yard for all concrete furnished for this job." (R. 528.)

"In making this ready-mixed concrete Rider bought sand which was pumped out of the Ohio River in Ohio, West Virginia or both. The Duquesne Sand Company, which pumped the sand from the river, sold it to Duquesne Slag Products Company. It was on Slag Products Company's land that Rider's operations for the contract mentioned were being carried on. It is sufficient to point out, to settle this part of the case, that some of the barges of

2. The interstate commerce alleged was the movement of supplies and materials between various points in the United States and the site of his plant and more particularly from outside the State of Pennsylvania into the State of Pennsylvania (R. 6a-7a).

sand were brought into Pennsylvania, consigned to Rider and unloaded by him at the place where his work was being carried on. This sand came from outside Pennsylvania. Whether it was consigned directly to Rider or was consigned to Duquesne Slag but delivered to Rider does not matter."[3] (R. 528.)

"During the course of the trial a witness from the steel company whose plant was being built at Allenport gave evidence that when the steel mill was completed it would ship much of its product out of the state of Pennsylvania, notably to Michigan and Kentucky. The court, in its charge, told the jury that if it was satisfied "that Mr. Rider's concrete was used for constructing a mill which would manufacture articles of steel to be shipped in interstate commerce" and if they believed the defendant extorted money from Mr. Rider they were instructed "as a matter of law that there has been a substantial effect on interstate commerce shown by the United States." (R. 529.)

"As said above, the indictment charged interference with interstate commerce on the receiving, not the sending end, except by stating that the sand was for a steel mill." (R. 529.)

In addition the facts relating to commerce are: At the time of the alleged extortionate demand, Rider, the concrete manufacturer, was receiving the sand by railroad car from the Pittsburgh Yard of the Duquesne Slag Products Company, the vendor, intrastate (R. 81a) (R. 82a). Later the sand was received by river barge from Duquesne Slag Company's Brady Street Yard (R. 71a).

3. The latter appears to have been the case (R. 58a-61a, 69a, 78a-80a, 93a).

SUMMARY OF ARGUMENT.

Petitioner's case was submitted to the jury over his objection[4] on two charges. One, obstruction in interstate commerce of the receipt of sand, and two, obstruction in interstate commerce of the delivery of steel from a plant not yet built. The first charge was laid in the indictment. The second was not. Petitioner argues that trial on the charge which was not laid in the indictment violated the Fifth Amendment's guarantees of due process of law, and of indictment.

Petitioner also argues that the court below extended the Hobbs Act unreasonably to embrace interference with prospective distribution of steel from a factory in the course of construction.

Finally, petitioner argues that the court below unreasonably extended the Hobbs Act to embrace extortion from a manufacturer of concrete who received sand intrastate from a supplier who had received it from another state.

If petitioner's final argument is correct, he asks that he be discharged. If petitioner's final argument is not correct, but either one of his first two arguments is correct, he asks for a new trial.

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4. R. 51a-53a, 300a.

ARGUMENT.

1. The Question of How Directly Extortion or Robbery Must Affect Interstate Commerce in Order to Be Covered by the Hobbs Act Was Answered Incorrectly by the Courts Below.

The trial judge told the jury that the necessary effect upon interstate commerce was present if the jury believed either one of two things: first, the evidence with regard to the receipt of sand for use in making the concrete, or, second, the evidence with regard to the future shipment of steel products from the steel mill (R. 287a, 288a).

We submit that both of these two bases were too remote in their connection with interstate commerce. If we are right as to both the sand or concrete and also right as to the steel, the law requires judgment of acquittal. If we are correct as to the steel, but incorrect as to the sand or concrete, the Constitution requires a new trial.

With regard to the steel, we cannot improve upon the language of Chief Judge Biggs (in which Circuit Judge Hastie joined) dissenting from the order denying the petition for rehearing. Chief Judge Biggs said (R. 554): "I am also in accord with the views expressed in Judge Hastie's dissenting opinion. The statute is extended unreasonably to embrace interference with prospective distribution of steel from a factory in course of construction. The Allenport plant of the Pittsburgh Steel Company is not and was not a facility in interstate commerce. Cf. *Mitchell v. Vollmer & Co.*, 349 U. S. 427 (1955); *Archer v. Brown & Root, Inc.*, 241 F. 2d 663, 669 (5 Cir. 1957)."

With regard to the sand or concrete, we point out that not everything which affects interstate commerce is within the power and control of Congress. If the effect upon interstate commerce of a robbery or extortion is merely

indirect or remote, or as in this case that interstate commerce had been used or had been involved, but was not involved at the time of the alleged offense, then the offense is not within congressional power, and there is not jurisdiction in the Federal Court.

Much has been written concerning the congressional control of commerce, and the fundamental and guiding principles have not varied too much since the adoption of the Constitution.

The scope of congressional control over commerce is undoubtedly broad, extending as it does, not only to transactions which can be deemed to be essential parts of a flow of interstate commerce but also to activities intrastate in character which are possessed of a close and substantial relation to interstate commerce. *Fairway Foods, Inc. v. Fairway Markets, Inc., et al.*, 227 F. 2d 193 (C. A. 9).

But there is a limitation because of our dual system upon this congressional power, and this limitation has been very well defined by your Honorable Court in the case of *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 57 S. Ct. 615, wherein it is said (p. 37):

> ". . . the scope of this power must be considered in the light of our dual system of Government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

The effect of the decision in the present case is to reject and point toward abolition of dual government under the Constitution.

Whether Congress is justified in regulating an intrastate or local activity which might affect interstate commerce was fully considered by your Honorable Court in the

case of *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 55 S. Ct. 837, in which the Court said (p. 546):

> "In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle.* * * But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government."

Rider purchased, used and disposed of the sand exclusively intrastate. The decision of the Court of Appeals for the Third Circuit in this case is therefore in conflict with the decision of the Court of Appeals for the Ninth Circuit, where that Court in the case of *Fairway Foods, Inc. v. Fairway Markets, Inc., et al.*, 227 F. 2d 193, determined that the activities of retail grocers purchasing and selling their wares exclusively intrastate are not a permissible field for congressional regulation under the Commerce power.

The decision of the Third Circuit is also in conflict with the following decisional dicta of the Second Circuit in the case of *Consolidated Edison Co. v. N. L. R. B.*, 95 F. 2d 390, 393 (modified on other grounds, 305 U. S. 197, 59 S. Ct. 206):

> "Consistently with these principles it can scarcely be doubted that the labor disputes of a local merchant

> will not normally fall within the Board's jurisdiction, even though some part of his stock in trade originates outside the state or some of his local customers are engaged in interstate commerce. In such a case the closing of the merchant's store by a strike of his employees would undoubtedly affect interstate commerce, but the effects would be too remote and indirect to bring his activities within the range of federal regulation."

See also *Application of Bookbinder's Restaurant*, 240 F. 2d 365 (Court of Customs and Patent Appeals), with which the decision in the present case conflicts.

We argue that the power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. See *McCulloch v. (State of) Maryland*, 4 Wheat. 316, 421, 4 L. Ed. 579. Cf. *United States v. Ferger*, 250 U. S. 199, 39 S. Ct. 445, 63 L. Ed. 936. *United States v. Darby*, 1940, 312 U. S. 100, 118, 61 S. Ct. 451, 459, 85 L. Ed. 609. See also *Wickard v. Filburn*, 1942, 317 U. S. 111, 63 S. Ct. 82, 87 L. Ed. 122. This does not advance the proposition that Congress, entirely apart from delegated powers, may enact measures governing local business. It may do so only when the local activity to be regulated substantially affects interstate commerce. See *Mandeville Island Farms v. American Crystal Sugar Co.*, 1948, 334 U. S. 219, 68 S. Ct. 996, 92 L. Ed. 1328.

We submit that the facts in this case do not bring it within the congressional power, and that the District Court and the majority of the Court of Appeals were in error in deciding that the Hobbs Act applied because the channels of interstate commerce had at some time been used by the local

concrete manufacturer, and might at some future time be used by the steel mill. Also in the case at bar, on the date when the extortionate demand was made, the concrete manufacturer was receiving sand by railroad car from the local supply yard of the vendor intrastate, the sand having originated in another state, but having been unloaded in Pennsylvania, and reloaded in Pennsylvania for intrastate travel to victim's plant (71a, 81a, 82a). We say that here is a case of an isolated extortion. There was no question of any extension of petitioner's alleged conduct so as to constitute a widespread practice or so as to result in the spread of labor unrest that might burden the flow of commerce. There was no question of economic effect upon commerce. The extortion was local, and it would take strained scholastic reasoning to prove that this isolated activity had a substantial or any effect upon interstate commerce. It is against reason and practical judgment to hold that under these facts the extortion was such as is proscribed by the Hobbs Act.

The District Court and the majority of the Court of Appeals disregarded fundamental constitutional principles relating to interstate commerce laid down many times by this Court.

2. Petitioner Was Tried on a Charge for Which He Had Not Been Indicted.

At page 362 of *DeJonge v. Oregon*, 299 U. S. 353, 57 S. Ct. 255, this Court said that "Conviction upon a charge not made would be sheer denial of due process." To which one might add that conviction upon a charge for which defendant has not been indicted violates the very first part of the Fifth Amendment guaranteeing indictment before trial.

In the present case sand had been brought from other states to Pennsylvania where it was used to make concrete for a Pennsylvania steel mill which was supposed to manufacture articles of steel to be sent out into interstate commerce. As the Opinion of the court below concedes (R.

529), the indictment charged interference with interstate commerce on the receiving end of the sand rather than interference with the sending of steel products from the steel mill into interstate commerce.

However, the trial judge instructed the jury that the necessary interference with interstate commerce could be found either on the basis of interference with receipt of the sand or on the basis of interference with the eventual sending out of steel products (287a, 288a).[5]

The Hobbs Act prohibits the obstruction of interstate commerce by means of extortion. Since the States can care for extortion, obstruction of commerce is the essence of the Federal offense. We say that a conviction could not constitutionally be predicated upon an obstruction which was not charged in the indictment.

What the trial judge did was permit petitioner to be tried on a charge for which he was never indicted. As the opinion of Chief Judge Biggs (in which Circuit Judge Hastie joined) dissenting from the order denying rehearing said (R. 554):

> "Stirone was therefore tried on two charges. One, obstruction of the receipt of sand, and two, interference with delivery of steel from a plant not yet built. The first charge was laid in the indictment. The second was not."

No one can tell on which of these two charges the jury based its guilty verdict. The basis may well have been the charge for which petitioner had not been indicted.

The Opinion of the Court of Appeals affirming the conviction cites *Berger v. United States*, 295 U. S. 78, 55 S. Ct. 629 and says the variance was harmless (R. 530).

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5. This was excepted to at 300a. The Opinion of the Court says evidence of obstruction at the sending end was not objected to on the grounds raised herein. But an objection on the ground of immateriality was made (51a-53a). We submit that a failure to object to immaterial evidence would not waive the right to have the case properly submitted to the jury anyway.

But as the dissenting Opinion of Chief Judge Biggs says (R. 554):

> "The doctrine of Berger v. United States, 295 U. S. 78, 81 (1935) cannot cure the error. It is clear in Berger that the crime for which Berger was convicted was within the words of the indictment, see 295 U. S. at pp. 81-83: the objection here is that the allegations of the indictment do not charge the crime for which Stirone was convicted."

In other words, petitioner was tried without a grand jury having made a prima facie finding of the charge ultimately submitted to the petit jury. We think this violated due process and, quite apart from due process, such a procedure also violated that part of the Fifth Amendment which requires indictment.

There remain the additional requirements of due process as to (a) notice, and (b) protection from double jeopardy. As to these, this Court laid down the law at page 82 of *Berger v. United States*, *supra*, as follows:

> "The true inquiry, therefore, is not whether there has been such a variance as to 'affect the substantial rights' of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense."

If either of the two requirements of the *Berger* case has not been met, conviction in the present case cannot stand.

First, we inquire whether the variance was such as to deprive petitioner of his protection against another pros-

ecution for the offense of having obstructed the sending out of the steel products into interstate commerce. It certainly would not. As the Court of Appeals for the Third Circuit said at page 130 of *United States v. Kenny*, 236 F. 2d 128:

> "Where the state charges an accused with two related offenses, an acquittal of one precludes subsequent prosecution on the other, if that acquittal was the result of decision in favor of the defendant on an issue which would be essential to the case against him on the second charge."

If Stirone had been acquitted, it would have been impossible to say whether or not the acquittal resulted from a decision in his favor on the issue of whether he obstructed the shipment of the steel products.[6] The verdict would have been not guilty as charged. That kind of obstruction was not charged in the indictment.

Second, we say that the other requirement of the *Berger* case has not been met, i.e., the requirement that the accused be definitely informed as to the charges against him, so that he may present his defense and not be taken by surprise.

Where a name is misspelled in an indictment, or where an incorrect dollar amount is cited for the value of stolen property, a variance between allegata and probata does not mean the defendant has not been sufficiently informed as to the charges against him. But the present case is different. In the present case, petitioner was charged with obstructing the receipt of sand in interstate commerce and was convicted of obstructing the shipment of steel products in in-

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6. On the other hand, it cannot be said that Stirone's conviction was based on an obstruction of the shipment of steel products. It may have been based on the alternative theory of the obstruction of receipt of sand. Since the two offenses involved different factual elements, the conviction of one offense would not bar trial for the other offense. The cases so holding are legion.

terstate commerce. This was not a case where the obstruction was proved to have been done in a different way from that charged. Here an altogether different obstruction was shown. And it is apparent from the face of the statute that obstruction of commerce is the essence of the offense.

The Opinion of the Court of Appeals says (R. 530) that the record discloses that counsel was prepared for the introduction of the testimony that the shipment of steel had been obstructed, rather than surprised by it. We know of no portion of the record disclosing any such thing and we note that no defense was made to the charge that the flow of steel products into interstate commerce had been dammed up.

Accordingly, we think both tests laid down in the *Berger* case must be resolved in petitioner's favor. The conviction should not be permitted to stand if we are correct about either test.

By affirming the conviction in the present case, the majority of the court below simply have set aside the rule that there cannot be a conviction upon a charge not made. Petitioner submits that intervention by this Court is required in order that there be reinstated the right of Americans to be tried only after notice of the charges against them.

If the Government follows its Brief in Opposition to our Petition for Certiorari, it may argue that under the Anti-Racketeering Act of 1934 (the predecessor of the Hobbs Act) Judge Learned Hand, in *United States v. Compagna*, 146 F. 2d 524, stated at p. 527:

> "* * * If these were the facts, the business was interstate as matter of law, and the question should not have been submitted to the jury; and since nobody contested the facts, but only their legal effect, it was unnecessary for the judge to say anything on the issue. * * *"

Then the Government may argue that this Court should see also under the later Act, *Hulahan v. United States*, 214

F. 2d 441, 446 (C. A. 8); *United States v. Green*, 246 F. 2d 155 (C. A. 7); *United States v. Lowe*, 234 F. 2d 919; *United States v. Varlack*, 225 F. 2d 665 (C. A. 2).

To this we answer simply that the facts were contested by petitioner's plea of not guilty, which is the only way we know of to plead the general issue in a criminal case. Judge Hand said in *United States v. Compagna*, as quoted above, that "nobody contested the facts." If Judge Hand meant Compagna had agreed to the facts Compagna is distinguishable from Stirone, for the latter has agreed to no part of the charge against him. But if Judge Hand meant that a plea of not guilty is not sufficient to raise a question of fact as to whether interstate commerce had been obstructed on a criminal trial for obstructing it, then Judge Hand was not correct.

The fact that the sand referred to in the exhibits was actually received depended upon oral testimony. The credibility of oral testimony is always for the jury. In a proper case the court may and should say to the jury that if they believe the oral testimony, they should find the alleged interference with interstate commerce (provided of course that the jury also believes the evidence of extortion). But only in that sense is the question of whether commerce was obstructed a question of law for the court. This is recognized by *Hulahan*, *Green*, *Lowe*, and *Varlack*, cited above. See *Hulahan v. United States*, 214 F. 2d 441, 446; *United States v. Green*, 246 F. 2d 155, 160, 161; *United States v. Lowe*, 234 F. 2d 919, 922, 923; *United States v. Varlack*, 225 F. 2d 665, 670, 671.

The facts on the commerce question were for the jury and it was constitutional error for the trial judge to have submitted the commerce question to that jury on an alternative basis not charged in the indictment.

CONCLUSION.

For the foregoing reason, petitioner submits that he itled to be discharged because a sufficient interference the receipt of sand in interstate commerce was not , and that he is entitled to a new trial if either or both other arguments are correct and his argument about nd is not correct.

Respectfully submitted,

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